

No. 12,530

IN THE

United States Court of Appeals  
For the Ninth Circuit

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NICK W. MAROOSIS,

*Appellant,*

VS.

JAMES G. SMYTH, United States Col-  
lector of Internal Revenue,

*Appellee.*

On appeal from the United States District Court for the  
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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**FILED**

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**BRIEF FOR APPELLEE.**

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**OPINION BELOW.**

The opinion of the Court below (R. 295-306) has  
not been reported.

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**JURISDICTION.**

This appeal involves federal floor stocks taxes on dis-  
tilled spirits imposed by Section 2800 (k) of the In-  
ternal Revenue Code as added by Section 308 (a) (k)  
of the Revenue Act of 1943. The appellant on or  
about May 1, 1944, filed an inventory as of April 1,

1944 and on July 1, 1944, paid the floor stocks taxes as reported to be due thereon. (R. 3.) The Commissioner of Internal Revenue determined the return to be false and fraudulent and made an assessment for additional floor stocks taxes due on 1,222.85 proof gallons of distilled spirits in the sum of \$3,668.55 and an *ad valorem* penalty of 50% on \$9,467.81, the total amount of floor stocks taxes incurred on April 1, 1944, in the sum of \$4,733.91, and also \$76.19 in adjustments, making a total assessment of \$8,478.65. (R. 6.) This sum together with interest making the total sum of \$9,876.39 was paid to the Collector in installments from June 15, 1946, to February 2, 1948. (R. 4.) Taxpayer filed a claim for refund which was denied by the Commissioner of Internal Revenue on February 15, 1949. (R. 7-8.) The taxpayer filed his complaint on June 22, 1949. (R. 2-19.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The case was tried and judgment was entered for the Government on February 27, 1950. (R. 57-58.) Within sixty days and on March 24, 1950, notice of appeal was filed (R. 60), pursuant to the provisions of 28 U.S.C., Section 1291.

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### QUESTIONS PRESENTED.

1. Whether the findings of fact and conclusions of law are supported by the pleadings and the evidence.
2. Whether the assessment is arbitrary and capricious and therefore illegal and void.

3. Whether the evidence is sufficient in law to support the 50% fraud penalty.

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### STATUTES INVOLVED.

Internal Revenue Code:

Sec. 2800. TAX.

\* \* \* \* \*

(k) [added by Section 308 (a), Revenue Act of 1943, c. 63, 58 Stat. 21]<sup>1</sup> 1944 FLOOR STOCKS TAX.—

(1) *Tax*.—Upon all distilled spirits upon which the internal-revenue tax imposed by law has been paid, and which on the effective date of Title III of the Revenue Act of 1943, are held and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor stocks tax of \$3 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof-gallon.

(2) *Returns*.—Under such regulations as the Commissioner with the approval of the Secretary shall prescribe, every person required by paragraph (1) to pay any floor stocks tax shall, on or before the end of the thirtieth day following the effective date of Title III of the Revenue Act of 1943 make a return and shall, on or before the first day of the third month following such effective date, pay such tax. Payment of the tax

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<sup>1</sup>The Act went into effect February 25, 1944, and the floor stocks tax attached on April 1, 1944, as provided by Section 301.

shown to be due may be extended to a date not later than the first day of the tenth month following the effective date of Title III of the Revenue Act of 1943, upon the filing of a bond for payment thereof in such form and amount and with such surety or sureties as the Commissioner, with the approval of the Secretary, may prescribe.

(3) *Laws Applicable*.—All provisions of law, including penalties, applicable in respect of internal-revenue taxes on distilled spirits shall, insofar as applicable and not inconsistent with this subsection, be applicable in respect of the floor stocks tax imposed hereunder. For the purposes of this subsection the term “distilled spirits” shall include products produced in such manner that the person producing them is a rectifier within the meaning of section 3254 (g).

(26 U.S.C. 1946 ed., Sec. 2800.)

Sec. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

\* \* \* \* \*

(d) ADDITIONS TO TAX.—

\* \* \* \* \*

(2) *Fraud*.—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

\* \* \* \* \*

(26 U.S.C. 1946 ed., Sec. 3612.)



**STATEMENT.**

This is an action brought by the taxpayer, a resident of San Francisco, California, against James G. Smyth, the Collector of Internal Revenue for the First Collection District of the State of California. (R. 50.)

Pursuant to Section 308 of the Revenue Act of 1943, the taxpayer filed a floor stocks tax return in which he reported 1,330.36 proof gallons of distilled spirits on hand on April 1, 1944, at the 458 Geary Street store and paid the floor stocks tax of \$3.00 per gallon thereon. Thereafter, the Commissioner of Internal Revenue assessed additional floor stocks taxes upon an alleged under-declaration of the inventory of distilled spirits at the 458 Geary Street store in the sum of \$3,744.74 and a fraud penalty of \$4,733.91. The additional assessment was in the sum of \$8,478.65, plus interest of \$1,397.74 for a total of \$9,876.39 which was paid to the Collector of Internal Revenue, in installments from June 15, 1946, to February 2, 1948. (R. 3-4, 20.) The taxpayer filed a claim for refund of \$9,876.39 (R. 10-19) on the ground that the inventory of distilled spirits on hand April 1, 1944, as shown in the floor stocks tax return was true and correct and was supported by an audit report of W. E. Holcomb, Auditor of the California State Board of Equalization covering the period from July 1, 1943 to June 30, 1944. (R. 15.) The refund claim was denied on February 15, 1949 (R. 8), and the complaint was filed November 26, 1949. (R. 25.)

On March 31, 1944, 200 cases of Three Rivers whiskey floor stock of the store at 458 Geary Street were moved by taxpayer from a warehouse to an unknown destination. (R. 51.)

On May 2, 1944, the collector, by his agents, took a physical inventory of the stock of the store at 458 Geary Street and after determining the sales and purchases of the store for the month of April, 1944, adjusted the inventory back to April 1, 1944. The inventory as adjusted did not include, nor did it account for the 200 cases of Three Rivers whiskey moved from the warehouse on March 31, 1944. The inventory did not include, nor did it account for 100 cases of Three Rivers whiskey later claimed by taxpayer to have been located in the basement of a store at 499 Haight Street, San Francisco, California. (R. 51.)

The comparison of the inventory of May 2, 1944, as adjusted to April 1, with taxpayer's tax return of May 1, 1944, showed a difference in over-declaration of distilled spirits by taxpayer of 108.98 proof gallons. (R. 51.)

Neither the inventory taken by the Collector on May 2, 1944, as adjusted to April 1, 1944, nor the inventory taken by taxpayer on April 1, 1944, upon which his tax return of 1330.36 proof gallons was predicated, was true or correct. Taxpayer's tax return of May 1, 1944, was false and incorrect. Subsequent to May 2, 1944, the Collector determined taxpayer's purchases and gross sales of distilled spirits

for the period from November 1, 1942, to March 31, 1944, and was informed by taxpayer that the percentage of sales of distilled spirits as to other sales for that period was 86%. Use by the Collector of the percentage figure of 86% under the circumstances was reasonable and was more favorable to taxpayer than would have been the use of 66% which was the percentage originally suggested by taxpayer as correct. The Collector converted the money figure for purchases and gross sales of distilled spirits during that period into proof gallons and determined that taxpayer had failed to declare 1,222.85 proof gallons of distilled spirits in his tax return of May 1, 1944. Such method was the most reasonable and rational one available to the Collector under the circumstances, especially since because of the knowledge the Collector's agents had of the diversion of the 200 cases of whiskey mentioned above the Collector could have no confidence in any report by the taxpayer. The Commissioner of Internal Revenue thereafter levied an assessment on the taxpayer. (R. 51-52.)

Taxpayer knowingly, intentionally, wilfully and deliberately concealed and failed to declare in his floor tax return filed May 1, 1944, the 200 cases of whiskey removed from the warehouse on March 31, 1944. (R. 53.)

### **SUMMARY OF ARGUMENT.**

There is ample evidence in the record to sustain the findings of fact made by the Court below that taxpayer's floor stocks tax return was incorrect, and that Three Rivers whiskey was removed from a warehouse to places other than the liquor store at 458 Geary Street, San Francisco, California. That same evidence supports the finding that taxpayer knowingly, intentionally, wilfully, and deliberately concealed and failed to declare 200 cases of whiskey removed from the warehouse on March 31, 1944. It then follows from those findings that taxpayer is liable for the fraud penalty. The amount of the assessment is the result of a calculation based upon estimated sales of distilled spirits equal to 86% of total sales, a figure given the agent by the taxpayer, and upon the failure of taxpayer's books to show the sale of the large quantity of whiskey withdrawn from the warehouse. This is the most rational basis under all the circumstances as found by the Court below. There is no evidence in the record to prove that the assessment was arbitrary or incorrect and no basis for entry of a judgment in favor of the taxpayer.

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### **ARGUMENT.**

#### **I.**

**THE FINDINGS OF THE DISTRICT COURT ARE SUSTAINED  
BY THE PLEADINGS AND THE EVIDENCE.**

The evidence before the District Court clearly sustains the findings of fact made by the Court, and

the judgment should be affirmed. There is ample evidence to sustain Finding of Fact III (R. 51), that 200 cases of Three Rivers whiskey was moved from a warehouse on March 31, 1944, to an unknown destination. Witness Hedrick testified that taxpayer, on February 21, 1944, stored 775 cases of Three Rivers whiskey in the San Francisco warehouse of which 375 cases had been removed up to March 30, 1944. (R. 246.) The removals are listed in Exhibit A.<sup>2</sup> On March 31, 1944, he and inspector Arisco observed a truck at 458 Geary Street; they kept this truck under observation and at 12:15 P.M., it went to the San Francisco warehouse where taxpayer had his whiskey stored. A coupe known to the witness to be associated with taxpayer's store drove up at the warehouse while the truck was there and the driver of the coupe and the driver of the truck had a conversation. At 2:15 P.M., the warehouseman brought cases resembling whiskey cases to the platform and loaded them into the truck. At 3:00 P.M., the truck left the warehouse and the witness followed it to the Standard Garage on Drumm Street, where he saw the cases transferred from the truck to a black panel-bodied Dodge truck which was in the rear of the garage. The witness then followed the Dodge truck to a residence at 1348 and 1350 San Bruno Avenue, where it was driven into the basement garage of the residence. (R. 246-248.) The witness returned to the Standard Garage at about 5:00 P.M. At 7:15 the

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<sup>2</sup>Exhibit A is not printed in the record but is partially described. (R. 213-214.)



truck drove to Joseph's liquor store and several cartons of whiskey were taken from it and loaded into automobiles parked at the curb. At 8:15 P.M., the truck was driven to 2066 Fillmore where four hand-truck loads of cartons resembling liquor cartons were loaded from the store into the truck which drove off at about 8:40 P.M., but due to traffic the witness could no longer follow. (R. 248-249.)

Exhibit A<sup>3</sup> shows the withdrawals of whiskey from the warehouse. On March 30, 1944, 200 cases were withdrawn and on March 31, 200 cases were withdrawn. But the sales records of taxpayer did not account for the disposition of this much whiskey. Total sales on March 30 and 31 were only \$2,433.06 and \$2,663.90, respectively. (R. 219-221.) And accordingly to taxpayer's own testimony, he sold Three Rivers whiskey at \$40 per case and in larger quantities at \$33 per case. (R. 221-222.) If the taxpayer had sold the 400 cases of whiskey on the last two days before the floor stocks tax attached his receipts for Three Rivers whiskey alone would have been not less than \$6,600 and perhaps nearer \$8,000 on each of those days.

Taxpayer testified that his records did not include large cash sales. (R. 137.) But when he was asked, on cross-examination, to account for the sale of 200 cases he pointed to a figure 80 and identified that as the price received for two cases of Three Rivers

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<sup>3</sup>Exhibit A is not printed in the record but is partially described. (R. 213-214.)

whiskey on March 31, 1944 (R. 220-221), and when asked how much of the 500 cases of Three Rivers whiskey was on hand March 30 and March 31, he testified that there was no way of telling. (R. 222.) This evidence supports the District Court's Finding of Fact IV that the 200 cases of Three Rivers whiskey withdrawn March 31, 1944 was not included in taxpayer's inventory of April 1, 1944.

Prior to March 30, 1944, taxpayer had withdrawn from the warehouse 375 cases and had on hand April 1, 1944, 180 cases of Three Rivers whiskey (R. 240) and according to his own testimony he had on hand 171½ cases besides the 100 cases which he contends were at 499 Haight Street. (R. 222-223.) It is a reasonable assumption under the evidence that the Three Rivers whiskey reported in taxpayer's tax return was that remaining from withdrawals made from the warehouse before March 30, 1944. Taxpayer testified that he thought the 100 cases were placed in the Haight Street Store on March 29 (R. 224), but when witness Hedrick made the spot check on May 2, 1944, and 60 cases were supposed to be stored there, Hedrick saw no whiskey stored in the basement, it was empty but for rubbish and he was advised that the basement was never used. (R. 239.) Taxpayer's inventory had an over-declaration of 108.97 proof gallons as compared with the inventory of the Collector made May 2, 1944, as of April 1, 1944. Mr. Bruch tried to explain that by saying there were 60 cases of Three Rivers whiskey still at the Haight Street store. However, taxpayer claimed to

have 100 cases which contained 206 proof gallons and the amount of the so-called over-declaration is only about one-half of 100 cases. There is substantial evidence to support the District Court's Findings of Fact III and IV.

The taxpayer offered no evidence to refute the evidence offered on behalf of the Collector but after trial he made a motion to reopen the case, based upon the affidavit of David Dellari. (R. 23-26.) The affidavit merely states that affiant is the owner of the premises at 1348-1350 San Bruno Avenue, San Francisco, California, which he had rented to Tommy Briggs and Frank O'Connor, and on or about April 1, 1944, three agents of the Alcohol Tax Unit came to him for permission to examine the garage for whiskey. He took them to the garage but they found no whiskey. This affidavit in no way refutes the Collector's testimony but proves that the agents made a further effort to locate the whiskey which had been transported in the Dodge truck on March 31, 1944. The lower Court rightly stated that taxpayer should have offered evidence to refute the Collector's evidence. Several people knew of the transfer, from the warehouse, the man who drove the coupe, the man at the warehouse, two men in the truck and the man at the Standard Garage. (R. 246-247.) As a matter of fact, whoever it was who withdrew the whiskey from the warehouse was the agent of taxpayer and he failed to produce the only person or persons who could testify to which place or places the whiskey had been transferred.



The evidence as above set forth proves also, since taxpayer's records failed to show the sale of the Three Rivers whiskey, that it should have been included in his inventory which it was not. The Court's finding, therefore, that his inventory was incorrect is supported by substantial evidence and must stand and the same applies to the inventory taken by the Collector on May 2, 1944, and adjusted back to April 1, 1944.

The fact that the taxpayer withdrew 400 cases from the warehouse on March 30 and March 31, which, according to his records, were not sold on those days, and the testimony of the Collector as to what transpired on March 31, 1944, is a sound basis for the Court's Finding of Fact VII that taxpayer knowingly, intentionally, wilfully and deliberately concealed and failed to declare in his tax return filed May 1, 1944, the 200 cases of whiskey removed from the warehouse on March 31, 1944, and the 100 cases claimed to have been at the Haight Street store.

Finding of Fact VII is sufficient to sustain the Conclusion of Law IV, that the return was false and fraudulent and that taxpayer deliberately suppressed vital facts with the intent to evade taxes which justified the assessment of the fraud penalty.

The taxpayer contends that the evidence offered by the Collector is irrelevant and shows only suspicion. (Br. 28-36.) The chief issue in the case is whether the taxpayer's tax return was correct. Under this issue it was material for the Collector to produce

evidence to show that the return was false; and any evidence having a bearing on that issue was material. Surely it will not be said that the withdrawal of 400 cases of whiskey from the warehouse on March 30 and 31, 1944, and the fact that taxpayer's records for those days failed to show sales of such quantities was immaterial. This evidence goes to the very heart of the case. The District Court's findings are sustained by substantial material evidence.

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## II.

### **THE ASSESSMENT IS NEITHER ARBITRARY NOR EXCESSIVE.**

The assessment is supported by substantial evidence and is therefore neither arbitrary, excessive nor void. Revenue Agent Hedrick checked the records of wholesale liquor dealers to determine the quantity of distilled spirits purchased for the 458 Geary Street store from November 1, 1942, to March 31, 1944, and found that the purchases amounted to 12,944.74 proof gallons. (R. 13.) From that information Hedrick found the average price paid for distilled spirits during that period to be \$15.965 per proof gallon. (R. 274.) Upon this computation the cost to taxpayer came within \$41 of the amount paid for distilled spirits during this period as shown by taxpayer's ledger. (R. 251-252.) The agent then computed the selling price at cost to taxpayer plus one-third and arrived at the average selling price of \$20.93 per proof gallon. (R. 252.) The gross sales from November 1,

1942, to March 31, 1944, amounted to \$269,287.26 as stipulated. (R. 27.) The proof gallons of distilled spirits sold during the period was determined by taking 86% (taxpayer's estimate) of that figure and dividing it by \$20.93, and amounted to 11,023.46 proof gallons. By subtracting the amount from the amount on hand November 1, 1942, plus the amount purchased during the period, the agent determined that taxpayer had 2,553.21 proof gallons on hand April 1, 1944. This showed an under-declaration of 1,222.85 proof gallons in taxpayer's inventory. (R. 13.)

Taxpayer has failed to attack the correctness of the formula used except to say that instead of using 86% the agent should have used 96% because that is the percent used by the State Auditor to determine the quantity of distilled spirits in proportion to the gross sales. The period of time involved in the State Auditor's calculation was from July 1, 1943, to June 30, 1944; only three quarters of which cover a portion of the period prior to the taxpayer's floor stocks tax return. (R. 18.) Furthermore, the quantities of distilled spirits sold each month increased and therefore the percentage of distilled spirits sold in relation to total sales from July 1, 1943, to June 1, 1944, would have been greater than during the period from November 1, 1942, to March 31, 1944. Accountant Bruch testified that the 96.41 percentage figure was based upon a figure which included sales tax. (R. 193.) Furthermore, the figure used was \$91,767.40, total sales for the first three months of 1944. (R. 193.) The sales from January 1 to March 31, 1944, amounted

to \$36,510.93 as shown by the daily sales records which had been kept by taxpayer's employee, Mrs. Woodward. (R. 159-161.) Taxpayer's books did not show this difference (R. 187-189), and Bruch testified that without the daily record the sales of distilled spirits could not be determined. (R. 191.) The evidence offered by the taxpayer fails to establish that the assessment is wrong, or wherein it is wrong.

The best evidence to sustain taxpayer's floor stocks tax return was his books. *Bergdoll v. Pollock*, 95 U.S. 337; *United States v. Fidelity & Casualty Co.*, 115 F. (2d) 475 (C.A. 3d). He produced his books covering the period from November 1, 1942 to March 31, 1944, except those for the year 1943, which were missing except for November and probably October. They were available when the Collector made his audit. (R. 131, and Ex. 18.) Taxpayer did not explain why he could not produce the missing records but attempted to get the Court below to accept the percentage figure of the State Auditor.

In a suit for refund the burden of proof is upon the taxpayer to establish the invalidity of the tax. *United States v. Anderson*, 269 U.S. 422; *United States v. Mitchell*, 271 U.S. 9. Where from the record the Court is unable to find what portion of the alleged overpayment for which the suit has been brought was not owing, it is impossible for the Court to determine the amount of the judgment and the taxpayer's suit must be dismissed. *Philip Mangone Co. v. United States*, 54 F. (2d) 168 (C. Cls.).



Taxpayer contends that the assessment was arbitrary and excessive, but he admits that he told the agents that his distilled spirits sales amounted to 86% of his business. (R. 145-146.) Thus the determination of the Commissioner was made upon the taxpayer's own estimate. Wherein then is it arbitrary? Furthermore if we take the 400 cases of whiskey withdrawn from the warehouse on March 30 and March 31, 1944, and conclude that taxpayer's sales records do not show their disposition together with the 100 cases claimed to have been stored at the Haight Street address, we have 400 or 500 cases of Three Rivers whiskey on hand which were not taken up in the April 1 inventory and included in the tax return filed May 1, 1944. The Court held the 100 cases at the Haight Street store were omitted from the inventory because he had no confidence in taxpayer's testimony. (R. 302.) The Three Rivers whiskey was stored in the warehouse. If there was not room for storage in the store for more whiskey why should it be withdrawn? Taxpayer's evidence cannot be believed.

The taxpayer has failed to produce any evidence to show the extent to which the Commissioner's assessment is wrong and therefore the judgment must be affirmed. Taxpayer maintains that the concealment of 200 cases containing 412.8 proof gallons does not sustain an assessment on 1,222.85 proof gallons. (Br. 36-39.) The assessment is not based upon the concealment of 200 gallons only. The taxpayer's records were incomplete and it was impossible to determine from the sales records the amount of dis-

tilled spirits sold from November 1, 1942, to March 31, 1944, so the Commissioner took taxpayer's estimate of 86% of all sales in dollars and converted it into proof gallons thus leaving 1,222.85 proof gallons which were omitted from the inventory. An assessment based upon an estimate is lawful. *United States v. United States Fidelity & Guaranty Co.*, 144 Fed. 866 (Conn.); *United States Fidelity & Guaranty Co. v. United States*, 220 Fed. 692 (C.A. 4th).

*Helvering v. Taylor*, 293 U.S. 507, originated in the Tax Court and involved the redetermination of the tax. The Supreme Court said (p. 511):

Before the Board of Tax Appeals the taxpayer introduced evidence to show the details of the transaction and that there was no change in value of the utilities stock between the time he got it in August, 1927, and the date, October 13 of the same year, on which he transferred it to the holding company in exchange for its shares and that the entire increase in value came after that transfer. No opposing evidence was offered.

Furthermore, where the Tax Court has before it the redetermination of the tax there is no presumption of the correctness of the Commissioner's determination. In a suit for refund, however, the assessment having been made and paid it is presumed that the assessment is correct and the burden is on the taxpayer not only to prove that the assessment was wrong but also wherein and to what extent it is incorrect. *United States v. Rindskopf*, 105 U.S. 418; *United States Fidelity & G. Co. v. United States*, 201

Fed. 21 (C.A. 2d). The *Taylor* case, *supra*, is thus distinguishable from the instant case.

In *McDonald v. Commissioner*, decided November 11, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,363), we need but look to the language of the Court which taxpayer quotes in his brief. (Br. 46.) The daily slips made out for the year 1941 were placed in evidence by the taxpayer and he testified that they truthfully reflected his gains. The Commissioner determined that he must have had a 10% profit and the Court said such an assumption *without evidence* could not be accepted in the face of taxpayer's testimony supported by his records.

In *Harris v. Commissioner*, decided November 12, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,235), the Tax Court, with reference to the Commissioner's computation said:

"We are not fully informed as to how he arrived at most of these figures, but we do have the testimony of the man who compiled them that, as a starting point, relying on an unwarranted interpretation of a conversation with petitioner, he multiplied the bank deposits by two, apportioned the income to the dental practice and the hotel and deducted as estimated expenses the figures shown, thus arriving at the net income shown."

In the instant case we have no unwarranted interpretation by the agent. We have taxpayer's corroboration that he told the agents his sales of distilled spirits were 86% of the total sales and the only reason

he now believes the sales to have been greater is because of the audit made by the State of California, which covers a different period. (R. 145-146.)

In *Ward v. Commissioner*, decided July 14, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,133), the Court said that where the basis of the assessment is plainly not consistent with the surrounding circumstances the determination is without rational foundation and is excessive. And in *Stratman v. Commissioner*, decided June 7, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,143), the Court said the Commissioner's mark-up was not even in the general neighborhood of that employed by the Revenue Agent. The decisions in these cases are not applicable to the facts and circumstances in the instant case.

In the instant case there is an abundance of competent and relevant evidence to sustain the assessment. In *National Weeklies v. Commissioner*, 137 F. (2d) 39, 41 (C.A. 8th), the Court said:

When a taxpayer challenges the factual warrant for a deficiency assessment by the Commissioner, he must produce evidence before the Board of Tax Appeals which reasonably demonstrates that the Commissioner was wrong. *Burnet v. Houston*, 283 U.S. 223, 51 S. Ct. 413, 75 L. Ed. 991; *Lumaghi Coal Co. v. Helvering*, 8 Cir., 124 F. 2d 645; *Clements v. Commissioner*, 8 Cir., 88 F. 2d 791. If the taxpayer's evidence is so equivocal and indefinite as not to afford a satisfactory legal basis for determining the facts, the Board may properly declare that he has failed to sustain the burden of demonstrating that the Com-



missioner was wrong and may uphold the deficiency determination accordingly. *Mahler v. Commissioner*, 2 Cir., 119 F. 2d 869.

The conclusion that the Commissioner's determination, that taxpayer failed to declare 1,222.85 proof gallons of distilled spirits in his floor stocks tax return was reasonable, must be sustained.

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### III.

#### **THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN THE FRAUD PENALTY.**

There is ample evidence in the record to sustain the Court's Finding VII that 200 cases of whiskey were deliberately and wilfully concealed and not declared in the floor stocks tax return. Section 3612 (2) (d), Internal Revenue Code, *supra*, provides that 50% of the amount of the return shall be added in case a false or fraudulent return or list is wilfully made. The amount of the penalty is not in question because it is based upon amount of the correct return. The only objection taxpayer makes is that there is no substantial evidence to sustain it.

The Collector accepts the burden to prove that taxpayer wilfully made a false return. We need not, therefore, review the cases cited by the taxpayer on this point. Instead we must review the evidence. The testimony of Agent Hedrick with reference to the removal of the 200 cases of whiskey on March 31, 1944,

shows positive acts of removal and concealment. They were removed from the warehouse, taken to a garage where some cases were transferred to a black panel Dodge car and taken to the premises on San Bruno Avenue. Other cases were loaded in another automobile on the street near the Geary Street store. Taxpayer's records failed to account for the disposition of such quantities before April 1, 1944, when the inventory was taken. This evidence shows a wilful removal and concealment.

Why should taxpayer withdraw whiskey from the warehouse if there was no room in his liquor store to keep it? There is only one answer and the lower Court gave that answer: So that those distilled spirits need not be declared in his floor stocks tax return! So that taxpayer could avoid payment of the floor stocks tax! There was no other logical or rational reason and taxpayer made absolutely no effort to explain these removals. If the 200 cases had been sold, under the circumstances and conditions described by Agent Hedrick the taxpayer would have remembered it. The sale of 200 cases to one or two persons on the last day before taking the inventory was not an ordinary transaction and yet taxpayer did not give one word of explanation. The only rational conclusion to be drawn from these circumstances is that the taxpayer was concealing some whiskey to avoid payment of tax.

Taxpayer contends that the Court's finding with reference to the removal of the 200 cases of whiskey

is immaterial and there is on evidence that it was whiskey. (Br. 36-37.) It was not necessary to allege affirmatively in the answer that taxpayer concealed 200 cases of whiskey and the manner in which it was accomplished. The amount which was concealed more nearly approximates that on which the additional floor stocks taxes were assessed. The fact that the additional assessment was made implied that taxpayer had distilled spirits on hand which were not inventoried and any evidence to so show was relevant and material to the issue.

So far as the record shows taxpayer had Three Rivers whiskey stored at the San Francisco warehouse and nothing else. It cannot be assumed that he withdrew from the warehouse anything other than what he had stored there. The only reasonable presumption is that the cases contained whiskey. Exhibit A in evidence shows the withdrawal of 200 cases of whiskey from the warehouse by the taxpayer on March 31, 1944, and that is not disputed.

The evidence proves beyond a doubt that taxpayer wilfully and intentionally concealed distilled spirits so as to avoid the payment of tax. The Court's conclusions of law must therefore be sustained.

**CONCLUSION.**

There is substantial evidence in the record to sustain the findings of fact, conclusions of law and the judgment, and no reversible error having been committed by the District Court, the judgment of the lower Court must be affirmed.

Dated, San Francisco, California,  
October 4, 1950.

Respectfully submitted,

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